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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

SCHUYLKILL ENERGY RESOURCES, INC.,
Petitioner,

v.

PENNSYLVANIA POWER & LIGHT COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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Important legal issues are not resolved by chanting formulaic incantations. Moreover, mere repetition of a proposition does not make it true. Apparently, however, respondent is of another persuasion, for in its nine pages of Argument, it manages to repeat the word "speculative" 14 times, not counting synonyms. This drumbeat strategy seeks to capitalize on the erroneous theme that dominated the decisions below, summarized by the refusal of the Third Circuit to "permit SER to pursue such a speculative path to recovery under the Sherman Act." Petitioner's Appendix ("Pet. App.") 16a. Should the Court adopt the simplistic approach championed by respondent, there will be but one "certain" result: monopolists in markets that are undergoing deregulation will have a license to harm future competitors without fear of transgressing the antitrust laws.

ARGUMENT

The rebuttal to respondent's theme is inherent in the facts of this case. To be sure, petitioner has conceded that as a "potential competitor" in a market undergoing deregulation, its claim entails projection of future marketplace realities. Although those realities cannot be precisely measured by looking at present market conditions and may pose difficulties of proof at trial, they cannot properly form the basis for a motion to dismiss. Such realities are inherent in any antitrust claim that looks to the future. For example, courts routinely examine the prospective effects of allegedly unlawful behavior in the context of assessing whether a proposed merger will violate Section 7 of the Clayton Act by substantially lessening competition or tending to create a monopoly in the future, *see* 15 U.S.C. § 18, or determining whether an attempt to monopolize has a "dangerous probability of success" under Section 2 of the Sherman Act, 15 U.S.C. § 2, or determining whether a potential competitor in an existing market can show that its exclusion would harm competition. *See* Petition at 12-13 and cases cited therein.[1]

Accordingly, unless the antitrust laws are to be rendered worthless to protect future competition in a deregulated market from present predatory conduct, the need for predictive evidence regarding impact on competition cannot be a fatal flaw. Petitioner is not seeking an award of damages

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[1] Indeed, the federal antitrust enforcement agencies recognize that the antitrust laws may be used to combat anticompetitive conduct today that stands to harm competition in markets that do not exist. *See* 1995 Department of Justice and Federal Trade Commission Antitrust Guidelines for the Licensing of Intellectual Property at § 3.2.2 (Antitrust agencies will examine whether licensing arrangements "may affect the development of goods that do not yet exist.") (Footnote omitted).

for lost future profits or other future injury that one might argue is speculative given the early state of retail deregulation in Pennsylvania. Instead, petitioner seeks only damages for injuries and costs it has already incurred as a result of conduct motivated by the prospect of future competition. Indeed, if petitioner has correctly ascribed anticompetitive motive to respondent's conduct, respondent itself was able to predict that petitioner would be a competitive force in the new market. How then can respondent credibly argue that, notwithstanding its own ability to predict the competitive consequences of petitioner's entry into a future market, petitioner should nonetheless be precluded from proving its case on grounds that petitioner's prediction of the same market is too speculative?

Most importantly, the facts presented by the petition for a writ of certiorari disclose 10 critical points that are are not "speculative" in any sense:

1. There presently exists a retail market for electric power in central eastern Pennsylvania.

2. At all relevant times during which petitioner suffered injury, respondent, by law, monopolized that market.

3. Pennsylvania has changed that law so as to permit retail competition in respondent's service area and already has begun to phase it in.

4. Independent power producers (like petitioner) who have supplied electrical energy under PURPA contracts to utilities (like respondent) will be the major suppliers in the deregulated market.

5. Petitioner has capacity, in excess of its existing commitments, to sell electricity to respondent's retail

customers and is actively pursuing a competitive role in the deregulated market.[2]

6. Respondent is keenly aware of the competition it will face in the new deregulated era, is "positioning" itself to respond to that competition, and has already gone so far as to notify customers of its general plan. Pet. App. 104-05a.

7. Right now "46 states have either initiated or completed efforts to bring retail competition to their electrical utility industries." Amicus Curiae Brief of Koch Energy Trading Inc. at 4-5. And existing monopolists in states other than Pennsylvania have adopted anticompetitive strategies, not unlike respondent's program here, to weaken potential competitors among the existing independent power producers.

8. In the year before the filing of the complaint, respondent invoked its power to curtail energy purchases from petitioner five times as often as it had in the previous four and one-half years combined. Petitioner has alleged that these curtailments were targeted specifically to impair its future ability to compete in the deregulated market. Respondent has yet to offer a credible explanation for this startling increase or to rebut the evidence that it did not curtail its own generation proportionately.[3]

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[2] Without shame, respondent continues to rely upon an inadvertent comma in petitioner's complaint to urge that petitioner has admitted that it has no excess capacity. Even though one judge on the Court of Appeals understood that the comma could be removed if amendment were permitted, the panel -- astonishingly -- denied leave to amend. *See* Petition at 17-19 and Note 14. If nothing else, this Court should reverse summarily on that ground.

[3] Even in its Brief in Opposition, respondent does no more than allege that it "had to curtail its own generation . . . more frequently than it had in the past." Brief in Opp. at 3. If it had curtailed its own production proportionately, that would have been easy to document.

9. Because the PURPA contract forbid respondent from curtailing based upon "reasons of economic dispatch" and all PURPA costs are reimbursed dollar-for-dollar by its ratepayers, there is no plausible motive for respondent's conduct other than an intent to weaken or destroy petitioner as a potential competitor.

10. If the antitrust laws are found to be inapplicable to conduct harming competition in markets in the process of deregulation, it is "open season" for predatory conduct that the antitrust laws were enacted to prevent.

These 10 indisputable points are incompatible with respondent's argument.

Respondent belittles as involving "existing markets" the federal cases that establish the standing of potential competitors to combat the anticompetitive conduct of monopolists with an antitrust remedy. Brief in Opp. at 14. However, respondent misses the important point that federal case law involving competition in existing markets establishes the principles from which potential competitors draw support. Unless the advent of a deregulated market causes those principles to evaporate, they are directly relevant here.[4]

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[4] In two footnotes, respondent chides petitioner for not having cited subsequent developments in two cases. Brief in Opp. at Notes 16 and 17. But those developments did not affect the matter at issue here, and thus the omission of these citations was not misleading. What does mislead, however, are respondent's footnotes which deliberately leave standing the impression that petitioner had concealed something important. Moreover, footnote 16 puzzlingly describes the 1996 decision of the Fifth Circuit as *en banc* when, in fact, the requests for *en banc* reconsideration were denied. *Great Western Directories Inc. v. Southwestern Bell Telephone Co.*, 74 F.3rd 613, 615 (5th Cir.), *cert. dismissed*, 117 S. Ct. 26 (1996).

CONCLUSION

Unless the Third Circuit's opinion is vacated, the protections normally afforded potential competitors will be denied by default for those entities attempting to enter soon to be deregulated markets.[5] Because that would gravely impair the future of deregulation in the electric power industry -- a movement with nationwide momentum -- as well as numerous other industries that are undergoing deregulation, this case merits review now. This petition does more than dramatize the plight of a single aggrieved; it presents for review an issue that is critical to the success of deregulation across the country.

Respectfully submitted,

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[5] Conspicuously, respondent cites no authority for such an undoing of the antitrust laws.